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EXAMINER	
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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 10/820,880
Filing Date: April 09, 2004
Appellant(s): KRUIK ET AL.

Robert Barrett
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 8/3/07 appealing from the Office action mailed 2/7/07.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

CA950750	HEGADORN et al.	7-1974

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1, 6-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hegadorn et al (Canadian patent 950750).

Patent no. 950750 discloses pre-baked pastry crusts. The crust comprises about 60-90% dehydrated pre-baked pastry crumbs, 7-25% fat and 0-20% binder material. The binder material may be any sugar, hydrolyzed cereal solids, starches, cellulose, gums or combinations of any of these. The fat may be melted fat or powdered fat. The fat suitable for use can be any of the commercially available fats or hydrogenated vegetable oils.

The patent does not specifically disclose biscuit, the properties as recited in claim 1, the amount of fat claimed, the property of the fat, the inclusion of other ingredients in the mixture of baked pastry and fat, the amount of overrun as in claims 9-10, the making

of the confection as in claims 11, 17, the inclusion of other material in the ice confection as in claims 12-14, the form of the confection as in claim 15 and the mixing temperature as in claim 16

The patent discloses using baked crumbs which is a baked product. Biscuit is a baked product; thus, the two particles are the same because the claims have not set forth any difference between the biscuit particles and the baked particles in the patent. When baked particles are mixed with the fat, it is obvious the mixture will have the same property as in claim 1 because the same materials are used. It is also obvious the fat will have the solid fat content as claimed because the patent disclose the same fat as claimed. It would have been obvious to vary the fat content when desiring to alter the taste, texture, consistency of the mixture. It would also have been obvious to add other food ingredients to enhance the taste of the product; the selection of the type of ingredients and the amounts can vary depending on the taste and flavor desired. It would also have been obvious to combine a frozen confection with the shell disclosed in the patent because it is well known to place frozen confection in pie shell as discussed on line 4 of page 1 of the patent. The type of confection selected depends on the taste and flavor wanted and would have been an obvious matter of choice. It would have been obvious to use any known method to make the frozen confection; both molding and extrusion are well known in the art. It would also have been obvious to have any varying percent of aeration depending on the texture desired for the product. It would have been obvious to include other inclusion to enhance the taste of the ice confection; this is notoriously well known in the art. It would have been obvious to form the shell in

any form depending on the look wanted. It would have been within the skill of one in the art to determine the appropriate temperature of the fat so that it can be easily mixed with the particles. This can readily be determined through routine experimentation. It would have been obvious to form the ice confection as the shell or the baked particles as the shell depending on the type of confection wanted. Frozen desserts come in many different shapes and forms; one can readily see this in a supermarket or ice cream novelty store. It would have been obvious to one skilled in the art to make the various forms claimed because they are well known in the art. It would have been within the skill of one in the art to determine the temperature to pour the particles through routine experimentation in absence of showing of unexpected result or criticality.

(10) Response to Argument

On pages 11-12 of the appeal brief, appellant argues Hegadorn teaches away from the claims because Hegadorn teaches using a higher amount of pastry crumbs, a lower amount of fat and preferably a binder. This argument is not persuasive. The amount of crumbs in the Hegadorn mixture is 60-90%; this range falls within the one claimed. Thus, Hegadorn does not necessarily teach higher amount of pastry crumbs and the amounts of crumbs include those claimed. As to the binder, this component is optionally; thus, Hegadorn does disclose mixture without the binder. As to the amount of fat, the rejection takes the position that it would have been obvious to vary the fat content to alter the taste, texture, consistency and fat content of the product. Appellant does not present evidence or reasoning why this would not have been obvious to one

skilled in the art. Food products having varying range of fat content are notoriously well known in the art. For example, cookies come in variety of fat content as fat free, low fat, and high fat; the same is true for many other types of food product. A few examples include ice cream, cake, cracker, pie, pastries etc... Hegadorn discloses on page 7 line 13 that " preferred proportions" may be varied. While Hegadorn discloses 7-25% fat, there is no disclosure that the amount of fat cannot be higher. Thus, there is no teaching away from using higher amount of fat. While appellant argues that the reference teaches away from the claimed product, appellant does not point to any teaching or present evidence or reasoning why the reference teaches away from the claims. A simple difference between two compositions does not mean one is teaching away from the other. Varying the amount of fat in food products is not an unknown concept. Appellant has not demonstrated any unexpected result or criticality with respect to the amount of fat claimed. Appellant contends Hegadorn uses a smaller percentage of fat because its product is intended to be baked and therefore a reduced amount of fat is necessary. Appellant has not presented any evidence to show that a product subjected to baking must have a reduced amount of fat. It is known in the art to make cake with a high fat content with the use of butter, shortening or oil. It is also known to substitute fruit puree, starch or other fat mimetic for the butter, shortening or oil. Both of these types of cake are subjected to baking. Furthermore, Hegadorn discloses on page 5 lines 31-32, " if desired, the crust structure can be made harder by baking"; thus, baking is not required. Even if appellant's argument is supported, it is still not convincing because baking is optional. On page 13 of the appeal brief, appellant

argues Hegadorn fails to disclose or suggest the processing step of bringing an ice confectionery and the biscuit mass. Hegadorn teaches the crust mixture is used to make dessert including frozen desserts etc..This clearly suggests to one skilled in the art to use the mixture with frozen confectionery to make a frozen dessert. For example, one can use the crumb mixture with ice cream to make an ice cream pie. When an ice cream pie is made, the step of bringing an ice confectionery and the biscuit mass is readily apparent. The selection of the type of filling to be used with the crumb mixture would have been an obvious matter of choice. Appellant comments that the baked product of Hegadorn would likely be more susceptible to penetration by moisture contained in an ice confectionery thereby resulting in a product that is unable to maintain a biscuit consistency during storage and consumption as required. The key word in appellant's statement is " likely"; appellant has not shown that the product is more susceptible to penetration by moisture. The statement is a speculation; furthermore, the mixture in Hegadorn as pointed out above does not need to be baked.

In summary, appellant has not shown any unexpected result or criticality in the amount of fat claimed. Varying the fat content in food products to modify mouthfeel, texture, flavor, fatty content etc.. is well known in the art as food products come in varying different fat contents. For example, there are low fat ice-cream, full fat ice cream, fat-free ice cream; the same is true with many other product such as cookies, cake, pastries to name a few. While appellant argues Hegadorn teaches away from the claimed product, appellant does not point to any specific teaching or present any factual evidence or reasoning why the reference teaches away. Hegadorn discloses 7-25% fat

but does not disclose that the fat cannot be higher; Hegadorn does not disclose a preferred embodiment in which the amount of fat is lower and discloses that the proportions may be varied. Thus, increasing the amount of fat to affect physical attributes and sensory properties would have been obvious to one skilled in the art.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Lien Tran
LIEN TRAN
PRIMARY EXAMINER
Group 1700

Conferees:

Milton Cano

Romulo Delmendo
Appeal Conferee